IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 423 of 1981

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MAHANT SHRI VISHWANATHJI MAHESHGIRI - Appellant(s)
Versus
CHARITY COMMISSIONER & 1 - Defendant(s)

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Appearance :

NOTICE SERVED for Appellant(s) : 1,MS PAURAMI B SHETH for Appellant(s) : 1,MR MANAV A MEHTA for Appellant(s) : 1,
Mr. K.L. Pandya, AGP for Defendant(s) : 1,
NOTICE SERVED for Defendant(s) : 2, 2.2.1, 2.2.2, 2.2.3, 2.2.4, 2.2.5,2.2.6

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 12/09/2006

ORAL JUDGMENT

Present appeal has been filed by the appellant herein, original-applicant challenging

the order dated 28th November 1979 passed by the learned District Judge, Sabarkantha at Himatnagar in Civil Miscellaneous Application No. 54 of 1978 in dismissing the said application and confirming the order passed by the Charity Commissioner dated 29.6.1978 in Appeal No. 71 of 1977.

2. On the basis of the complaint/application by the original-respondent No.2, i.e., Shri Kuberbhai Parmar, enquiry came to be initiated by the Deputy Charity Commissioner, Ahmedabad in Application No. 120 of 1977 as to why Nilkanth Mahadev Mandir of Vaktapur should not be declared/registered as 'Public Trust'. It was the contention on behalf of original-applicant, complainant that Shri Nilkanth Mahadev Mandir of Vaktapur was a Public Trust and the appellant herein is a Mahant of the said temple. A preliminary enquiry in that regard was held by the Inspector of the Public Trust Registration Office, Ahmedabad. During the said enquiry it

was revealed that the said temple was a Public Trust and the said Inspector submitted his report to that effect to the Deputy Charity Commissioner, Ahmedabad, and on the basis of the said Report the Deputy Charity Commissioner, Ahmedabad, initiate suo motu proceedings, being Enquiry No. 120 of 1977 under Section 19 of the Bombay Public Trust Act [hereinafter referred to as 'the Act'] for registration of the aforesaid Temple as a 'Public Trust'. The Inspector, who submitted the Report, was examined and the appellant as well as the original-respondents were also examined. The appellant examined himself and 3 witnesses on his side to rebut the evidence against him. Some revenue record pertaining to the properties of the aforesaid Temple was also produced by the Inspector. The Deputy Charity Commissioner, after considering the evidence on record, came to the conclusion that the Temple in question was a Public Trust and the appellant was the sole

trustee thereof; and the mode of succession to the trusteeship was from Guru to Chela. The Deputy Charity Commissioner also held that the objects of the Trust were to maintain and run the Temple for the benefit of the Hindus and to keep it open for darshan and to celebrate festivals. The Deputy Charity Commissioner further held that the Temple building with 3 rooms and 3 Wells and the lands bearing Survey No. 150, 156, 157, 158 and 161 situated at Village Vaktapur were the properties of the Public Trust. The annual income and expenditure of the Trust was held to be about Rs. 1,000 and Rs. 8,000 respectively income from agricultural lands, royalty, Bhets etc., were held to be sources of income of the Trust and accordingly the Deputy Charity Commissioner directed registration of the aforesaid Temple as a Public Trust. Being aggrieved and dissatisfied with the order passed by the Deputy Charity Commissioner, Ahmedabad in Application No. 120 of 1977 by which Nilkanth

Mahadev Mandir of Vaktapur, Taluka Himatnagar, District-Sabarkantha was directed to be registered as Public Trust, the appellant herein preferred the Appeal No. 71 of 1977 before the Charity Commissioner, Gujarat State, Ahmedabad under Section 72 of the Act. The Charity Commissioner, Gujarat State, Ahmedabad, by his order dated 29.6.1978 dismissed the said appeal confirming the order passed by the Deputy Charity Commissioner in Application No. 120 of 1977. Being aggrieved and dissatisfied with the order passed by the learned Charity Commissioner, dated 29.6.1978 in Appeal No. 71 of 1977, the appellant herein preferred Civil Miscellaneous Application No. 54 of 1978 in the Court of learned District Judge, Sabarkantha at Himatnagar and the learned District Judge, Sabarkantha by order dated 28th November 1979 dismissed the aforesaid application confirming the order passed by both the authorities below. Being aggrieved and dissatisfied with the order passed by the learned

District Judge, Sabarkantha dated 28th November 1979 in Civil Miscellaneous Application No. 54 of 1978 in dismissing the same and confirming the order passed by both the authorities below, i.e. Deputy Charity Commissioner as well as the Charity Commissioner in directing to register the aforesaid Temple as a Public Trust, the appellant herein, original-applicant, has preferred the present Appeal.

3. Shri K.L. Pandya, learned AGP, relying upon the decision of the Division Bench of this Court in the case of *Parvez Rustamji Bharda vs. Navrojji Sorabji Tamboly (Decd) & Ors., 2001(2) GLR Page 949,* has raised a preliminary objection and has submitted that the present Appeal is to be treated as a Second Appeal as held by the Division Bench of this Court, and if the same is to be treated as a Second Appeal, then all the limitations of Section 100 of the Code of Civil Procedure are to be applied and the present

Appeal is maintainable only on substantial question of law. Against which, Shri Manav Mehta, learned advocate appearing on behalf of the appellant, has submitted that for applying the limitations under Section 100 of the Code of Civil Procedure as contended on behalf of the learned AGP, the decision of the Division Bench in the case of *Parvez Rustamji Bharda vs. Navrojji Sorabji Tamboly (Decd) & Ors., (supra)* will not be applicable. He has submitted that the question before the Division Bench was with regard to maintainability of Letters Patent Appeal against the judgment and order passed by the learned Single Judge, in an appeal against the order passed by the learned District Judge under Sec.72 of the Act and the Division Bench of this Court has held that the proceedings before the District Court under Section 72(1) are in the nature of an appeal; that the District Court exercises appellate jurisdiction while disposing of the case, and hence Clause 15 of the Letters

Patent is directly attracted; therefore the Court learned Single Judge before whom the appeal is filed under Section 72(4) of the Act is to be treated as a 2nd Appellate Court; and hence a "party aggrieved by a judgment rendered by the learned Single Judge cannot, as of right, file any intra-court appeal to the Division Bench of the said High Court without obtaining certificate of fitness from the learned Single Judge who decided the matter." Shri Mehta, learned advocate has relied upon the direct decision of the learned Single Judge of this Court in the case of *Miya Mohamed Abdulkarim Jariwala And Anr. v. Collector of Surat And Ors.*, reported in *18 GLR Page 488* and submitted that the learned Single Judge of this Court, considering the very provision of the Act, i.e., Section 72(4) of the Act has held that there is nothing in sub-section (4) of Section 72 to conclude that no appeal can lie on questions of fact against the decision of the Supreme Court. According to him, it is

further observed by the learned Single Judge that it merely provides that an appeal shall lie to the High Court as if the decision of the District Court is a decree from which an appeal ordinarily lies and that cannot mean that the limitations provided in Section 100 of the Code on the jurisdiction of the Court must be read in sub-section (4) of Section 72 of the Act. In support of his submission, that in an appeal under Section 72(4) of the Act the limitations of Section 100 of the Code of Civil Procedure would not be attracted, he has relied upon Unreported Judgment of the Division Bench of this Court in the case of *Shri Ghanshyamlal Ratanji Mehta & Anr. v. Maneklal Jaykrishna, since died represented through Receiver Narandas Kalyan and Others,* rendered in *First Appeal No. 506 of 1971* wherein the Division Bench has also negatived the contention that an appeal under Section 72(4) of the Act is maintainable only on substantial question of law and not on facts.

4. Before dealing with the present Appeal on merits, the preliminary objection, raised by the learned Assistant Government Pleader is required to be considered. The learned Assistant Government Pleader has relied upon the decision of the Division Bench of this Court in *Parvez Rustamji Bharda vs. Navrojji Sorabji Tamboly (Decd) & Ors., (supra)* in support of his submission that an appeal against the order passed by the learned District Judge under Section 72(4) of the Act be treated as a Second Appeal and that all the restrictions of Section 100 of C.P.C., would be applicable. At the outset, it is required to be noted that the question before the Division Bench was with regard to maintainability of a Letters Patent Appeal against the judgment and order passed by the learned Single Judge in an appeal under Section 72(4) of the Act, and the Division Bench of this Court has observed that when a Single Judge of High Court renders a judgment in

exercise of jurisdiction under Section 72 of the Bombay Public Trusts Act, he exercises appellate jurisdiction against the decree passed or order made in exercise of appellate jurisdiction. The Division Bench also further observed that, to put it differently, he exercises jurisdiction as a 2nd Appellate Court and not as a 1st Appellate Court, and hence a party aggrieved by a 'judgment' rendered by the Single Judge cannot, as of right, file an intra-court appeal to a Division Bench of the same Court without obtaining certificate of fitness from the learned Single Judge who decided the matter. Thus, the restrictions under Section 100 of the Civil Procedure Code will be applicable to an appeal against an order passed by the learned District Judge and/or in an appeal under Section 72(4) of the Act was not an issue before the Division Bench in the case of *Parvez Rustamji Bharda vs. Navrojji Sorabji Tamboly (Decd) & Ors., (supra)*. However, there are two direct decisions of this Court dealing with the

very issue. In an appeal before the Division Bench of this Court being First Appeal No. 506 of 1971, when it was contended that though the appeal under Section 72(4) of the Act is technically called a First Appeal,it should be treated as a 'Second Appeal' and the Court should interfere with the impugned order only if it is contrary to law or perverse, and, dealing with the said issue, the Division Bench of this Court has observed as under;

> *"We are unable to accede to the contention raised by Mr. Takwani because this appeal has been filed under sub-sec. (4) of Sec. 72 of the Bombay Public Trusts Act, 1950 which provides as follows :*
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> > *"An appeal shall lie to the High Court against the decision of the court under sub-sec.(2) as if such decision was a decree from which an appeal*

ordinarily lies".

The scope of the appeal has not been limited by sub-sec.(4) under which it lies. We do not see any warrant for importing into sub-sec. (4) of Sec. 72 the factors which have been specified in Sec.100 of the Code of Civil Procedure. When the language in which sub-sec. (4) of Sec. 72 has been expressed is unrestricted in character, it is not proper for us to limit its scope. Secondly, the District Judge who decided the application filed under Sec. 72 indeed exercised original jurisdiction. The application which he tries under Sec. 72 does not, it is true, have such a full-fledged scope as the trial of the suit has because whereas in a suit it is open to the parties to lead evidence as a matter of right, in an application under sec.72 the parties do not have any right to lead evidence. Ordinarily the case is decided on the evidence

recorded by the Deputy Charity Commissioner or the authority who held an enquiry under Sec. 19 of the Bombay Public Trusts Act. If any party wants to produce additional evidence, he has to seek the permission of the District Court. Therefore, though there is some difference between an application made under Sec. 72 and the suit, we feel, on considering the provisions of Sec.72, that the jurisdiction which the learned District Judge exercises is original jurisdiction. In that view of the matter, an appeal to the High Court on facts is permissible."

4.1. The identical question also came to be considered by the learned Single Judge of this Court in the case of *Miya Mohamed Abdulkarim Jariwala And Anr. v. Collector of Surat And Ors. (supra)*, and considering the provisions of Section 72(4) of the Act, the learned Single

Judge of this Court observed as under;

> *"To my mind this contention is clearly misconceived. Under sec. 72(4) of the Act, an Appeal is provided to the High Court against the decision of the court (court under sec. 2(4) means a District Court), as if such decision was a decree from which an Appeal ordinarily lies. There is nothing in sub-sec.(4) of sec.72 to conclude that no appeal can lie on questions of fact against the decision of the District Court. It merely provides that an appeal shall lie to the High Court as if the decision of the District Court is a decree from which which an appeal ordinarily lines. That cannot mean that the limitations provided by sec.100 of the Code on the jurisdiction of the court must be read in sub-sec.(4) of sec.72 of the Act."*

However, it is required to be noted that, both the aforesaid decisions were prior to 1987. However, so far as the present Appeal is concerned, the substantial question of law arises that whether the learned District Court was justified in directing to register the temple as a Public Charitable Trust solely relying upon Village Form No. 7/12 and the Revenue entries in absence of any other evidence and/or fulfilling all the conditions enumerated in Section 2(13) and 2(17) of the Act. Therefore, so far as the present Appeal is concerned, even if the restrictions of Section 100 of Code of Civil Procedure are to be applied, in that case also the present Appeal is to be decided on merits on the aforesaid question of law. Under the circumstances, the question, whether in an appeal under Section 72(4) of the Act limitations under Sec.100 of the Code of Civil Procedure are to be applied or not and the appeal under Section 72(4) of the Act is to be treated as a Second Appeal,

are kept open, as this Court will be now proceeding to dispose of the appeal on the admitted facts and on the aforesaid question of law.

5. Shri Manav Mehta, learned advocate appearing on behalf of the appellant, original-applicant, Mahant of the Temple, while relying upon Section 2(17) of the Act, has submitted that all the ingredients of Section 2(17) of the Act and Section 2(13) of the Act are required to be satisfied before considering a Temple for the purpose of declaring the same as a Public Trust. It is submitted by him that necessary ingredients of Section 2(17) are; (1) The place must be used as a place of public religious worship; (2) it must be dedicated to the Hindu community or any section thereof, or must be dedicated for the benefit of the Hindu community or any Section thereof or must be used as of right by the Hindu community or any section thereof; and (3) the

dedication or use of the place must be as a place of public religious worship. It is further submitted by him that the conditions laid down in these ingredients are cumulative, and before an Institution can be said to be a 'temple', all these conditions have got to be cumulatively satisfied. It is further submitted by him that, so far as the findings of the learned Trial Judge are concerned they all are in favour of the appellant and only on the basis of Entries in the Revenue record in which the name of 'Nilkanth Mahadev' is mentioned as a owner, the learned Trial Judge has held the Temple as a 'Public Trust'. It is submitted by him that the Entry in the Revenue record is only for fiscal purpose and merely because as the owner the name of Temple is mentioned and/or the property was exempted from land Revenue the Institution will not become a Temple within the meaning of Section 2(17) of the Act and the same cannot be declared to be a 'Public Trust' within the meaning of Section

2(13) of the Act. Shri Mehta has relied upon the Unreported decision of this Court in the case of *Acharya Anantendra Maganlal alias Devkinandandas (Original Petitioner) vs. The Charity Commissioner, Bombay (Now the Charity Commissioner, Ahmedabad) in First Appeal No. 319 of 1960,* as well as another decision of the Division Bench of this Court in the case of *The Charity Commissioner Vs. Ichhashanker Laxmishanker Mehta and two others, Appeal No. 272 of 1960*, in support of his above submissions.

6. Mr. Mehta has further submitted that the learned Trial Judge has committed an error in not construing the provisions of the Gujarat Devasthan Inam Abolition Act, 1969. He has submitted that there is no such provision that on abolition of the Devasthan Inam the Government becomes the owner of the lands in question. It is submitted that merely because there was some Entry in the Revenue record with regard to

abolition of Devasthan Inam and the property in the name of 'Shri Nilkanth Mahadevji', the Temple will not become 'Public Trust' unless the ingredients of Section 2(17) read with Section 2(13) of the Act are satisfied.

7. On the other hand, Shri KL Pandya, learned A.G.P., while supporting the order passed by the learned Trial Judge, has submitted that in absence of any evidence produced on behalf of the appellant that the Temple was not dedicated by the ex-Ruler of Vaktapur the learned Trial Judge was justified in relying upon the Revenue record in which the properties stood in the name of Shri Nilkanth Mahadev. According to Shri Pandya, it is for the appellant to prove that it was his own property. It is further submitted by him that in view of the fact that the lands in question were declared to be Devasthan's Inam and on admission of Devasthan's Inam some Entry was made in the Revenue record that itself suggests that the

lands in question were Devasthan Inams and therefore the learned Trial Judge has rightly dismissed the application and held that the order passed by both the authorities below directing to register the Temple as a 'Public Trust' is just and proper.

8. Heard the learned advocates appearing on behalf of the parties. Before proceeding further with the order, few findings and observations of the learned District Judge are required to be referred to and considered which are on the basis of appreciation of evidence. The learned District Judge has observed that there is no evidence whatsoever regarding the origin of the Temple or the author of the same. There is no evidence regarding the dedication of the Temple for the use of 'Darshan' for the general public. The learned District Judge has further observed that there is no Galla petty or Bhandar petty in the Temple and that there is no evidence that the

Mahant of the Temple accepts the gifts or the bhets or the donations from the general public. The learned District Judge has further observed that there is no evidence of giving grant of the lands which were found to be in the name of 'Nilkanth Mahadev Temple to the temple or some Ruling authority. The learned District Judge observed that there is no evidence in respect of management of the property by deity persons. Now, in light of the above observations and findings of the learned District Judge, Section 2(13) and 2(17) are required to be considered. Section 2(13) reads as under;

> *[13] "Public trust" means an express or constructive trust for either a public, religious or charitable purpose or both and includes a temple, a math, a wakf, a dharmada or any other religious or charitable endowment and a society formed either for a religious or charitable purpose or*

for both and registered under the Societies Registration Act, 1860."

Section 2(17) reads as under;

[17] "Temple" means a place by whatever designation known and used as a place of public religious worship and dedicated to or for the benefit of or used as of right by the Hindu community or any section thereof as a place of public religious worship."

8.1. As per Section 2(17) of the Act, "Temple" means a place by whatever designation known and used as a place of public religious worship and dedicated to or for the benefit of or used as of right by the Hindu community or any section thereof as a place of public religious worship. Now, therefore, considering the provision of Section 2(17) of the Act, before an

Institution is considered to be a 'Temple' within the meaning of Section 2(17) of the Act, there must be a cogent evidence to prove that the said Institution was used as a place of public religious worship and dedicated to or for the benefit of or used as of right by the Hindu community or any section thereof as a place of public religious worship. Considering the aforesaid findings and the observations of the learned Single Judge, none of the ingredients of Section 2(17) is satisfied. Therefore, the 'Nilkant Mahadev' at Vaktapur cannot be termed as a 'Temple' within the meaning of Section 2(17) of the Act. As per Section 2(13) of the Act “Public Trust” means an express or constructive trust for either a public, religious or charitable purpose or both and includes a temple, a math, a wakf, a dharmada or any other religious or charitable endowment and a society formed either for a religious or charitable purpose or for both and registered under the Societies Registration Act,

1860. Now, as stated above, the learned District Judge has relied upon the mutation Entry No. 1233 dated 20th January 1981 with regard to an Entry of abolition of Devasthan Inams and the mutation Entries in which the name of 'Nilkanth Mahadev' is mentioned as a owner/tenant. As stated above, there is no evidence, whatsoever, with regard to dedication of the aforesaid Temple by the ex-Ruler of Vaktapur as alleged or any other evidence. In the case of *The Charity Commissioner Vs. Ichhashanker Laxmishanker Mehta and two others,(supra),* it is held that merely because the property was exempted from the land Revenue and/or unless there is any further evidence, the said property cannot be said to be a charitable property. The Division Bench also held that it was for the appellant to show that this exemption was on account of the fact that this was a charitable property. In the case of *Acharya Anantendra Maganlal alias Devkinandandas (Original Petitioner) vs. The Charity*

Commissioner, Bombay (Now the Charity Commissioner, Ahmedabad) (supra), the Division Bench negatived the submission to consider the Institution as a Public Temple on the basis of Entry in the Revenue record as a Barkhali land. The Division Bench observed as under;

> *"Mr. B.R. Sompura lastly contended that the fact that the land in village Amla was Barkhali land standing in the name of the Poojari of Radhakrishna Temple showed that it was land belonging to the temple and that the temple was a public temple. We do not see how the inference suggested by Mr. B.R. Sompura follows from the fact that the land is Barkhali land entered in the name of the Poojari of Radhakrishna temple. It may be that the land was given to the then Poojari of the temple for the maintenance and upkeep of the Seva of the temple and that is why it was entered in the records*

> *in the name of the Poojari of the temple. But there is nothing to show that Barkhali lands used to be given by the Ruler of Baroda only for maintenance and support of public temples. In the absence of such evidence it is not permissible to us to draw the inference that the temple was a public temple."*

9. Now, as stated above, there is nothing on record and/or there is no evidence how the Entries were made and on what basis the name of "Nilkanth Mahadev Mandir" was mentioned in the Pani Patrak and the Revenue record. As stated above, there is a clear-cut finding given by the learned District Judge that there is no evidence on record in respect of the dedication of the Temple to the public by the ex-Ruler of Vaktapur, and that there is no evidence regarding dedication of the Temple for the use of 'Darshan' for the general public. Now, considering the

evidence on record and the findings of the learned District Judge, it cannot be said that all the ingredients of Section 2(17) of the Act are fulfilled. In absence of any other evidence, the learned Trial Judge has committed an error in confirming the order passed by both the authorities below directing to register the Temple as a 'Public Trust' solely on the basis of the Entry in the Revenue record. Merely because the name of 'Temple' is mentioned in the Revenue record, the Temple would not become a 'Public Trust' and/or a 'Temple' within the meaning of Section 2(13) and 2(17) of the Act. There must be a further corroborative evidence satisfying all the ingredients. Under the circumstances, the learned Trial Judge has committed an error in relying upon only the mutation Entries and in directing to register the temple as a Public Trust. Under the circumstances, the judgment and order, passed by the learned District Judge, in dismissing the said application and confirming

the order passed by the Charity Commissioner as well as the Deputy Charity Commissioner directing to register the Temple as a 'Public Trust', requires to be quashed and set aside. However, it is required to be noted that, the lands in question, which are in the name of 'Nilkanth Mahadev', will not be of the ownership of the appellant and the same shall remain in the ownership of “Nilkanth Mahadev”. Even the aforesaid aspect has also been conceded by the learned Advocate appearing on behalf of the appellant.

10. For the reasons stated above, the order passed by the learned District Judge, Sabarkantha, dated 28th November 1979 in Civil Miscellaneous Application No. 54 of 1978; the order passed by the learned Charity Commissioner, Gujarat State, Ahmedabad, dated 29.6.1978 in Appeal No. 71 of 1977; and the order passed by the Deputy Charity Commissioner, Urban, at

Ahmedabad in Application No. 120 of 1977 directing to register “Nilkanth Mahadev” at Vaktapur as a 'Public Trust', are hereby quashed and set aside. This Appeal is allowed accordingly. However, there shall be no order as to costs.

[M.R. Shah, J.]

RMR.